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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79156860
Applicant	Aulbach Lizenz AG
Applied for Mark	HECHTER
Correspondence Address	JAMES R MENKER HOLLEY & MENKER PA PO BOX 331937 ATLANTIC BEACH, FL 32233 UNITED STATES eastdocket@holleymenker.com
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Filer's Name	James R Menker
Filer's e-mail	eastdocket@holleymenker.com
Signature	/jmenker/
Date	07/05/2016

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Applicant Name: Aulbach Lizenz AG.

Mark: HECHTER

Serial No. 79/156860

Examining Attorneys: Jonathan R. Falk and Claudia Garcia

Law Office 111

REPLY BRIEF OF APPLICANT

Pursuant to the Notice of Appeal filed on March 2, 2016, the Applicant has appealed the Trademark Examining Attorney's FINAL refusal to register the applied-for mark under Trademark Act Section 2(e)(4), 15 U.S.C. § 1052(e)(4), on the basis the applied-for mark is primarily merely a surname. This is the sole issue on appeal.

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The Examining Attorney does not argue that HECHTER is not a rare surname. Instead, the Examining Attorney argues that even rare surnames may be unregistrable. Applicant concedes that just because a term is not a common surname does not *per se* mean that the term would not be considered to be primarily merely a surname. However, where, as here, the term is an extremely rare surname, the extreme rareness of the surname outweighs the other *Benthin* factors used to evaluate whether a term is primarily merely a surname.

The evidence of record only firmly establishes that Hechter is the surname of about a dozen living individuals in the United States. The Examining Attorney argues that the evidence of record indicates that there may be about 160 more people with this surname in the United States. However, no actual evidence with respect to these other individuals is of record.

The Examining Attorney argues that the lack of evidence showing more than a miniscule number of people in the United States share the surname Hechter was occasioned by the US PTO's limited resources. While it is understandable that the US PTO does not have the resources to conduct marketing research, *see generally In re Pacer Tech.*, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003), Applicant avers that census records, telephone directories and other surname databases are publicly available online at no cost. Applicant also believes that the US PTO's access to the Lexis database of public records which was used to demonstrate the existence of the 8 to 10 individuals with the surname Hechter is not limited. The Examining Attorney was not therefore prevented from submitting a full list of the records. Applicant does not believe that there is any additional cost associated with creating a longer pdf that included all of the surname records or attaching such evidence to an Office Action. If the full list of records had been proffered, Applicant would have had the opportunity to examine the accuracy of the

purported total number of individuals in the United States with the surname Hechter. Instead, the total is left to conjecture and speculation. Even accepting the evidence as a sample, the size of the sample appears to be too small in this case to provide any degree of confidence as to the actual number of people with the surname Hechter.

Even if the US PTO's failure to proffer sufficient evidence to support the refusal is excused, a showing that Hechter is the surname of 174 people in the United States does not change the fact that it is an extremely rare surname. The Examining Attorney argues that despite the extreme rareness of the surname, the evidence of record shows that Hechter is "being used as a surname by individuals who have received notoriety in the United States in widely circulated and known news and information sources." Examining Attorney's Appeal Brief at p. 12. Although the individuals named in web evidence were recognized for somewhat newsworthy events, the evidence of record does not show that any of the individuals are or have ever been public figures or that an appreciable number of people were ever aware of these people. The mere mentions of Eliana Hechter and Israel Hechter in one-off newspaper articles does not establish that either of those individuals received broad exposure in the news or that they could be considered public figures. Thus, the evidence of record fails to support the assertion that Hechter would be perceived by the public as a surname. *Cf. In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004) (evidence of public figures with surname including James Rogan, a former Director of the United States Patent and Trademark Office and noted congressman, and Wilber Rogan, a former baseball hall of famer, supported the conclusion that public would perceive Rogan as a surname). Likewise, the mere fact that there is a Wikipedia article about Daniel Hechter does not establish that he is a public figure in the United States. Wikipedia is a worldwide website with over 5 million articles written in English. Moreover, the mention of

Daniel Hechter in four other web page excerpts on websites that are based outside the United States also does not establish that he is a public figure in the United States. As previously pointed out, DANIEL HECHTER is used in the web page excerpts to identify a brand just as often as it is used to identify a person. As a result, the probability that an appreciable number of consumers have ever been exposed to Hechter having been used as a surname is so small that the primary significance of this term to the purchasing public could not possibly be that of a surname.

Just as the record lacks sufficient evidence to establish that the applied-for mark is a surname, the evidence of record is equally deficient in establishing any of the other *Benthin* factors. Thus, the *Benthin* factors -- other than the first factor which heavily favors a finding that HECHTER is not primarily merely a surname -- are largely neutral in this case.

As the Board has previously expressed,[1] the rarity of a surname is of particular importance in the weighing of the *Benthin* factors. Because the Examining Attorney failed to make a *prima facie* case that the applied-for mark is anything other than an extremely rare surname, Applicant avers that the refusal to register the applied-for mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), is improper and must be reversed.

Respectfully submitted,

Dated: July 5, 2016

/jmenker/
James R. Menker, Attorney of Record

Applicant's Attorneys
HOLLEY & MENKER, P.A.
PO Box 331937
Atlantic Beach, FL 32233
T: 904-247-2620
eastdocket@holleymenker.com

[1] *See., e.g., In re Okamoto Corp.*, Serial No. 85739429 (February 6, 2015) [not precedential]; *In re SieMatic Schweiz GmbH*, Serial No. 79033882 (August 14, 2009) [not precedential].